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SEX CLASSIFICATIONS IN THE SOCIAL SECURITY BENEFIT STRUCTURE

The social security program, providing social insurance protection against old age, death and disability (OASDI),¹ has assumed increasing national importance in the last two decades, both in terms of revenue collected by payroll taxes and benefits paid.² The program's benefits are distributed according to family relationship. A worker receives benefits as the primary breadwinner, and wives, children, parents and a few husbands receive benefits as dependents. Since the benefit structure is rooted in traditional assumptions regarding family roles, the dependents' benefits are largely defined in terms of sex. Although some of Social Security's distinctions based on sex have been eliminated over the years, differentials remain in the dependent wife's, widow's, mother's, husband's, and widower's benefit provisions.³

With recent developments in the constitutional doctrines of equal protection and due process, the courts have indicated a greater willingness to carefully evaluate and strike down classifications based on sex. Social Security's sex-linked benefit structure may now be vulnerable to attack.

The future of Social Security may include not only reforms which will equalize existing benefit programs, but also reforms which will broaden the system's coverage.⁴ Since its initial adoption, the social security system has been expanded as societal views on the purpose of the program and those whom it should protect have changed. With the current reexamination of women's roles and Social Security's impact on

1. Federal Old-Age, Survivors, and Disability Insurance Benefits, 42 U.S.C. §§ 401-29 (1970), *as amended*, (Supp. II, 1972) [hereinafter referred to as OASDI or Social Security]. This note will not include any discussion of the health insurance benefits of social security, known as Medicare.

2. In 1971 social security payroll tax revenue reached 44 billion dollars, a growth from 4% of total federal revenue in 1949 to 23% in 1971. J. BRITAIN, *THE PAYROLL TAX FOR SOCIAL SECURITY* 1 (1972) [hereinafter cited as BRITAIN]. At the end of November, 1972, monthly cash benefits reached nearly 3.9 billion dollars. These benefits were paid to more than 28.3 million beneficiaries, health benefits included. 36 *SOC. SEC. BULL.*, Mar., 1973, at 1.

3. These differentials and social security's impact on women have become increasing concerns among those interested in improving women's social and economic status. *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES* (1968) [hereinafter cited as CITIZENS' COUNCIL]; HEW, *REPORT OF THE WOMEN'S ACTION PROGRAM 85-93* (1972) [hereinafter cited as HEW REPORT]; NATIONAL ORGANIZATION FOR WOMEN, *NOW GOALS* (1973); THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *REPORT OF THE COMMITTEE ON SOCIAL INSURANCE AND TAXES* (1963) [hereinafter cited as PRESIDENT'S COMMISSION].

4. *See* pp. 197-199 *infra*.

women, OASDI's primary protection of workers may eventually be extended to those, either men or women, now considered dependents who work at home without pay rather than in the labor force.

CURRENT OASDI BENEFIT PROVISIONS

The concept of the family embodied in the Social Security Act⁵ has evolved over time, but the basic assumption that men are the breadwinners supporting dependent women has remained. This traditional notion of proper sex roles is exemplified by the fact that wives and widows are presumed to be dependent on male workers, whereas husbands and widowers must prove their dependence. The worker's benefit itself has been designed with the male breadwinner model in mind.

Benefits for Workers

Under the original Act, the worker was the only beneficiary.⁶ Today, the worker is the primary beneficiary, but dependents receive some benefits from the worker's Primary Insurance Amount (PIA).⁷ To receive protection as a worker, a person must have worked for a substantial period of time in employment covered by OASDI.⁸ The program applies only to those who work for pay since benefits are calculated on the basis of an average monthly wage.⁹

Female and male workers' benefits have been calculated differently because the Act has assumed that the family breadwinner is a man. This differential treatment began in 1956 when women became eligible for benefits at age 62.¹⁰ The provision was designed to allow nonworking

5. 42 U.S.C. §§ 401-29 (1970), *as amended* (Supp. II, 1972) [hereinafter referred to as the Act]. "The Act" is used interchangeably with "OASDI" and "Social Security." See note 1 *supra*.

6. Social Security Act of August 14, 1935, ch. 531, § 202, 49 Stat. 623.

7. 42 U.S.C. § 415(a) (Supp. II, 1972).

8. This substantial period of time is called "a quarter of coverage." A "quarter of coverage" means a three month period in which the individual has received at least \$50 in wages in covered employment or has received at least \$100 of self-employment income. 42 U.S.C. § 413(a) (1970). To be "fully insured" under OASDI, a person must have at least one quarter of coverage per year from age 21 (or 1950, whichever is later) until the year in which she or he dies or reaches age 62, or a total of 40 quarters of coverage. 42 U.S.C. § 414(a) (Supp. II, 1972).

Social Security now cover 90% of workers in paid employment. Those not working in covered employment include federal civilian employees, certain employees of state and local government, and self-employed farmers who are voluntarily excluded from coverage. The remaining workers not receiving coverage are ineligible because of insufficient earnings, such as some domestic workers, farmworkers, self-employed farmers, nonfarm self-employed, and employees of nonprofit organizations. 36 Soc. Sec. BULL., Mar., 1973, at 75 (Table Q-2, figures for Sept., 1972).

9. 42 U.S.C. § 415(b) (1970).

10. Social Security Amendments of August 1, 1956, ch. 836, §§ 102(a), (c), 70 Stat. 809, *amending* 42 U.S.C. §§ 402, 416 (1952) (codified at 42 U.S.C. §§ 402(q),

wives to receive benefits at an earlier age in order to ease the financial strain on a married couple when the husband retired at age 65.¹¹ Although aimed at dependent wives, all women were allowed to take advantage of the provision, thereby encouraging the earlier retirement of working women. The early retirement provision was extended to men in 1961,¹² but the benefit-computation point used in determining the PIA was not reduced from age 65 to age 62 for men as it had been for women.¹³ Thus, for men any year of retirement between age 62 and age 65 was considered a year of low earnings in calculating the average monthly wage. This calculation resulted in lower benefits for men than for women with the same average earnings over their working years,¹⁴ and gave men a considerable incentive not to take advantage of early retirement. The 1972 amendments to OASDI provided for gradual elimination of this sex-based age differential over the next three years.¹⁵

By 1975 Social Security will give men the same incentive as women to retire at age 62, but it is likely that a larger proportion of women than men will continue to retire early, due to broader societal pressures. Women traditionally have been encouraged or even forced to retire at earlier ages than men although their greater life expectancy would suggest an opposite policy.¹⁶ Although early retirement has been seen

416(a) (1970)). In 1965, widows became eligible for reduced benefits at age 60. Social Security Amendments of July 30, 1965, Pub. L. No. 89-97, § 307(a), 79 Stat. 373, as amended 42 U.S.C. § 402(e) (1970). Early retirement benefits are permanently reduced to take into account the longer period over which they will be paid. 42 U.S.C. § 402(q) (Supp. II, 1972).

11. Wives were believed to be characteristically several years younger than their husbands. Bixby, *Women and Social Security in the United States*, 35 Soc. SEC. BULL., Sept., 1972, at 5 [hereinafter cited as Bixby].

12. Social Security Amendments of June 30, 1961, Pub. L. No. 87-64, § 102(a), 75 Stat. 131, amending 42 U.S.C. § 402 (1958) (codified at 42 U.S.C. §§ 402(a), (c), (f) (1970)).

13. 42 U.S.C. §§ 414(a) (1), 415(b) (3) (1970).

14. In *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968), a male plaintiff challenged the constitutionality of the sex classification in these provisions. His primary insurance amount at age 62 of \$100.60 was reduced by 20% to \$80.50 because of early retirement. A woman, with a history of equal earnings and retiring at age 62, would have had a PIA of \$115.60, reduced to \$92.50 because of early retirement. In her case, the three years from age 62 to age 65 would be ignored in computing benefits. In the man's case, those three years are included as three years of low earnings in the computation of an average monthly wage, resulting in a lower PIA.

15. Social Security Amendments of October 30, 1972, Pub. L. No. 92-603, §§ 104(a), (b), 86 Stat. 1340, amending 42 U.S.C. §§ 414, 415 (1970) (codified at 42 U.S.C. §§ 414(a), 415(b) (3) (Supp. II, 1972)). The provisions giving the effective dates of the 1972 amendments to 42 U.S.C. §§ 414, 415 (Supp. II, 1972), specify that in 1973 men's benefits will be computed using age 64, in 1974 using age 63, and in 1975 the computation point for both men and women will be age 62. *Id.* § 414 (effective date of 1972 amendments).

16. HEW REPORT, *supra* note 3, at 86.

as an advantage for women, it reflects a view that women are secondary workers. The social security system has reinforced this tradition by making early retirement more attractive for women than for men. In addition, the early retirement provisions, with permanently reduced benefits, have resulted in a greater proportion of women beneficiaries receiving significantly lower benefits throughout their remaining years.¹⁷

The male breadwinner model reflected in the worker's benefit structure suffers from a two-fold limitation. On the one hand, a majority of women between the ages of 18 and 65 now work.¹⁸ Working wives, many with dependent children, are a substantial proportion of the labor force, and an increasing number of married women are the primary breadwinners in their families.¹⁹ On the other hand, because Social Security only covers work for pay,²⁰ the many women who continue to work at home or as volunteers in the community are denied primary coverage as workers. This results in a larger proportion of men than women receiving the higher worker's benefit.²¹

Benefits for Dependent Women and Men

More women receive social security benefits as dependent wives, widows and mothers than as workers.²² The retirement benefit for

17. In June, 1972, 61.2% of female retired workers were receiving reduced benefits, compared to 40% for male retired workers. The average monthly reduced benefit for women was \$106. The average monthly reduced benefit for men was \$131. For women the average worker's benefit without reduction was only \$128 compared to \$158 for men. 35 Soc. SEC. BULL., Dec., 1972, at 74 (Table Q-5).

18. In May, 1973, 51.5% of women age 20-64 were in the labor force; 53.9% of those age 18 and 19 were in the labor force. 19 EMPLOYMENT & EARNINGS, June, 1973, at 24 (Table A-3). In 1950, only 37.2% of women age 18-64 were working. DEP'T OF LABOR, WOMEN'S BUREAU, HANDBOOK ON WOMEN WORKERS 22 (1969) (Table 6) [hereinafter cited as HANDBOOK].

19. Women age 20 and over made up 34% of the civilian labor force in 1972. 96 MONTHLY LAB. REV., Sept., 1973, at 105 (Table 4). 78.5% of working women in 1967 were married, widowed, or divorced. HANDBOOK, *supra* note 18, at 23 (Table 7). The number of working wives increased by 4.1 million between 1962 and 1969, 40% of the period's total labor force increase. 95 MONTHLY LAB. REV., Aug., 1972, at 11. In 1971, 59% of women workers were married and one-third of working women had both a husband and dependent children. 95 MONTHLY LAB. REV., Apr., 1972, at 9. Of the 44 million husband-wife families in 1970, wives were the main income recipients in 3.2 million families, 7.4% of the total. In 1960, the percentage was 5.7. CENSUS BUREAU, SOURCES AND STRUCTURE OF FAMILY INCOME 377 (1973) (Table 9).

20. See note 9 *supra* & text accompanying.

21. In June 1972, 8,072,238 men were receiving monthly benefits. Of these men, 99.9% received benefits as retired workers. At the same time, 13,111,337 women were receiving monthly benefits, but only 47% of these women received benefits as retired workers. 35 Soc. SEC. BULL., Dec. 1972, at 74-78 (Tables Q-5 to -10).

Nonrecognition of women's work in the home or community will be explored in the final section of this note.

22. Of the 13 million women receiving monthly benefits under OASDI in June, 1972, 6,990,000, or 53%, received benefits as dependent wives, mothers or widows. *Id.*

wives and the survivor's benefit for widows were added in 1939 with the presumption that wives are dependent upon their husbands.²³ If both a wife and her husband are retired, she automatically receives a benefit equal to one-half of her husband's PIA, unless she has worked in covered employment and her own worker's benefit is greater than her wife's benefit.²⁴ Roughly speaking, if a wife has average earnings over one-third of her husband's she will not then be considered "dependent" and she will receive a worker's benefit larger than her dependent's benefit would have been.²⁵ A widow, on the other hand, is treated as a dependent unless her own worker's benefit equals or exceeds her deceased husband's PIA.²⁶

23. Social Security Amendments of August 10, 1939, ch. 666, §§ 202(b), (d), (e), 53 Stat. 1364-65, as amended 42 U.S.C. §§ 402(b), (e), (g) (1970); REPORT OF THE SOCIAL SECURITY Bd., H.R. MISC. Doc. No. 110, 76th Cong., 1st Sess. 6-7 (1939). The wife's benefit was regarded as one way of increasing benefits for workers in the early years of the system. In 1939 two-thirds of all men over 65 were married. These provisions were designed to account for the greater presumptive need of the married couple, although proponents of the amendment believed many wives would eventually develop benefit rights based on their own earnings, thus eventually reducing the cost of the supplemental benefits to a relatively small amount. *Hearings on H.R. 6635, the Social Security Amendments of 1939, before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 59* (1939).

Divorced wives, and surviving divorced wives, or "divorced widows," if not remarried, were included in the wife's and widow's provisions beginning in 1965. They were not presumed dependent on their ex-spouses. Social Security Amendments of July 30, 1965, Pub. L. No. 89-97, § 308, 79 Stat. 375-78, as amended 42 U.S.C. §§ 402(b), (e), 416(d) (1970). In order to be eligible, a divorced wife or surviving divorced wife had to be receiving at least one-half of her support from the primary beneficiary, or receiving substantial contributions under a written agreement or a court order. In addition, her marriage to the insured must have lasted for at least twenty years. The support requirements were eliminated in 1972, so that only the twenty year duration of marriage requirement remains. Social Security Amendments of October 30, 1972, Pub. L. No. 92-603, § 114, amending 42 U.S.C. §§ 402, 416 (1970) (codified at 42 U.S.C. §§ 402(b), (e), 416(d) (Supp. II, 1972)).

24. 42 U.S.C. §§ 402(b) (1) (E), (2) (1970).

25. For example, if a working wife had an average monthly wage of \$200, her PIA would equal \$154.40. If her husband's average monthly wage were three times hers, or \$600, her wife's benefit would equal \$154.90, one-half of her husband's PIA of \$309.80. If her average monthly wage were \$250, her PIA would equal \$174.80; her worker's benefit would be larger and she would no longer receive a dependent wife's benefit. See 42 U.S.C. § 415 (Supp. II, 1972) (Table for Determining Primary Insurance Amount and Maximum Family Benefits).

Rather than questioning the dependency presumption, the *Report of the 1971 Advisory Council on Social Security* made the assumption more explicit and expansive.

[T]he program provides benefits . . . for those of his relatives whom the worker normally supports or has a legal obligation to support. . . . Benefits are provided for a wife or widow without a test of support because it is reasonable to presume that a wife or widow loses support, or a potential source of support, when the husband's earnings are cut off, except in situations where she, herself, has covered earnings and is eligible for a benefit on her own account that is larger than her wife's or widow's benefit.

1971 ADVISORY COUNCIL ON SOCIAL SECURITY, REPORT 34 (1971) [hereinafter cited as 1971 ADVISORY REPORT]. There is no recognition by the Advisory Council that husbands lose support, or potential sources of support, when their wives' earnings are cut off.

26. A widow receives a dependent's benefit equal to 100% of her deceased hus-

The benefits for husbands and widowers offer a stark contrast to the presumptive dependency benefits for wives and widows. The husband and widower benefits were added in 1950 to allow disabled or otherwise dependent men to receive benefits in the "rare" case where the primary breadwinner was the wife.²⁷ In order to qualify for benefits on a woman's wage record, a husband or widower must show that he received over one-half of his individual support from his wife.²⁸ Since OASDI assumes that one-half of family expenses are for the husband,

band's PIA. 42 U.S.C. § 402(e)(2)(A) (Supp. II, 1972). Before the 1972 amendments, a widow received only 75% of her husband's benefit. Social Security Amendments of August 10, 1939, ch. 666, § 202(d)(2), 53 Stat. 1365.

As the Social Security Administration prefers to explain the dependent wife and widow provisions, if a wife works and then retires, she receives her own benefit in any case. In addition, if her worker's benefit is low or non-existent, she receives a supplemental benefit up to the derivative benefit limits. Bixby, *supra* note 11, at 5.

Working women have expressed great dissatisfaction with the dependent wife's and widow's benefits. See CITIZENS' COUNCIL, *supra* note 3, at 67-78, 84-85; PRESIDENT'S COMMISSION, *supra* note 3, at 36-39. Under current provisions a married woman who has worked most of her life may get little or no more in benefits than she would have gotten had she never worked. Although she has paid social security taxes, she may receive no additional "return" over what she would have received had she remained a "dependent" wife.

The Social Security Administration is aware of these complaints, but points out that working women receive advantages for their contributions in the form of insurance protection against loss of earnings due to disability or death for themselves and their dependents. Bixby, *supra* note 11, at 9.

Rather than focusing on the differential treatment of working and nonworking wives, perhaps emphasis should be placed on the distinction between monetarily-employed workers, who supposedly have the ability to pay the payroll tax and those who work at home without financial compensation. In a very crude and indirect way, the social security system is compensating housewives through the wife's benefits for many years of unpaid labor.

27. Social Security Amendments of August 28, 1950, ch. 809, § 101(a), 64 Stat. 483, 485 (codified at 42 U.S.C. §§ 402(c), (f) (1970)).

These additional benefits were viewed as establishing parity between the dependents of working men and women. However, the differential support requirements were virtually ignored. A program analyst for Social Security stated:

The earlier legislation made no provision for benefits to a husband or widower on a woman's wage record. . . . The 1950 amendments have resolved this inequity. The new law retains the concept of deemed dependency of the wife on the husband, which fits the usual family situation, but it also permits the husband or widower to become a beneficiary on the basis of the wife's wage record if he has in fact been dependent on her.

Riches, *Women Workers and Their Dependents Under the 1950 Amendments*, 14 Soc. Sec. BULL., Aug., 1951, at 9, 11 [hereinafter cited as Riches].

28. 42 U.S.C. §§ 402(c)(1)(C), (f)(1)(D) (1970). This test of dependency must be met prior to any calculation of PIA, and support encompasses all income received by the couple from whatever source. As explained in *Clark v. Celebrezze*, 230 F. Supp. 798 (D. Mass. 1964), *aff'd*, 344 F.2d 479 (1st Cir. 1965), *cert. denied*, 385 U.S. 817 (1966), one of the few cases litigating a husband's right to benefits, the Social Security Examiner added together the total family income available for mutual expenses of the husband and wife, took half as the husband's total support, and took half again to see if he met the requirement, which he did not. "Support" is defined in 20 C.F.R. § 404.350(c) (1972) as including food, shelter, clothing, ordinary medical expenses, and "other ordinary and customary items." *Id.*

the wife must have paid at least three-fourths of the total family expenses for her husband to receive a dependent's benefit. If eligible, a husband will receive one-half of his wife's PIA, and a widower will receive a benefit equal to his wife's PIA.²⁹

Hostility toward liberalization of benefits for husbands and widowers continues to be based on the same traditional assumptions regarding family roles. The 1971 Advisory Council on Social Security assumed that all married men work unless disabled, and therefore, they could not be dependent on their wives.³⁰ The Council opposed elimination of the support requirement because of its feeling that men would receive double benefits financed by the public: benefits from public retirement plans for state or federal employees not covered by OASDI and benefits from OASDI derived from wives' wage records.³¹ Interestingly, the Council was not concerned about women who presently receive double benefits.³²

While husbands and widowers have at least a limited opportunity to draw benefits on their wives' wage records, divorced men, unlike divorced women, receive no protection under the Act.³³ The primary reason for the inclusion of divorced wives and "divorced widows" in the female benefit structure was to

provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years—especially housewives who have not been able to work and earn social security benefit protection of their own.³⁴

Since the Advisory Council assumed that men do not stay home and keep house,³⁵ they considered the sex-based distinction valid, providing no opportunity for a divorced man to show he departed from the norm.

The social security system provides further benefits for women with

29. 42 U.S.C. §§ 402(c) (3), (f) (3) (1970), as amended (Supp. II, 1972).

30. 1971 ADVISORY REPORT, *supra* note 25, at 34-35.

31. *Id.*

32. The Advisory Council stated that dual entitlement for women was not a problem because the number of wives who work in noncovered employment and who get dependents' benefits even though they are not really dependent is a relatively small proportion of wives receiving dependent benefits. The Council offered no support for this statement. *Id.* at 35.

33. Divorced husbands and surviving divorced husbands, not remarried, are not included in the husband's and widower's benefits as contrasted with divorced women. See note 23 *supra*.

34. REPORT OF THE COMMITTEE ON WAYS AND MEANS ON H.R. 6675, H.R. REP. NO. 213, 89th Cong., 1st Sess. 94 (1965), quoted in 1971 ADVISORY REPORT, *supra* note 25, at 36.

35. 1971 ADVISORY REPORT, *supra* note 25, at 36.

children.³⁶ A mother's benefit was added in 1950, payable to a wife, widow or surviving divorced wife under age 65 (now age 62) as long as she had in her care a child eligible for benefits.³⁷ The purpose behind the mother's benefit was to enable a wife with children to remain at home and care for them after her husband died, retired, or became disabled.³⁸ No corresponding father's benefit exists.

The system assumes that the death or disablement of the husband-father will result in a loss of earnings for the family, but does not make the same assumption regarding the death or disablement of the working wife-mother.³⁹ Although the 1950 amendments were viewed as a repudiation

36. Provision for wives with children whose husbands retire or become disabled is made through the wife's benefit. 42 U.S.C. § 402(b)(1)(B) (1970). Provision for wives with children whose husbands die is made through the mother's benefit. *Id.* § 402(g)(1).

37. Social Security Amendments of August 28, 1950, ch. 809, § 101(a), 64 Stat. 483, 485-86, *amending* 42 U.S.C. § 402 (1946) (codified at 42 U.S.C. §§ 402(b), (g) (1970)). A benefit for a worker's widow with an eligible child in her care was first added in 1939 under the provision "Widow's Current Insurance Benefits." Social Security Amendments of August 10, 1939, ch. 666, § 202(e), 53 Stat. 1365. The 1950 amendments changed the benefit title to "Mother's Benefit," extended protection to surviving divorced mothers and, under the wife's benefit, to mothers whose husbands retired or became disabled.

If the husband-father retires or is disabled, the mother's benefit is 50% of his PIA, 42 U.S.C. § 402(b)(1)(B), (2) (1970); if the husband-father dies the mother receives 75% of his PIA, *id.* § 402(g)(2).

Children may draw benefits on their parent's wage record. 42 U.S.C. § 402(d) (1970). When the dependent child's benefit was established in 1939, a child was deemed dependent on the father as long as the father was living with or contributing to the support of the child. A child was deemed dependent on the mother *only* if she was the sole support of the child and the father was no longer living with the child. Social Security Amendments of August 10, 1939, ch. 666, § 202(c), 53 Stat. 1364. After the 1950 amendments, if the mother was currently insured when she died or reached 65, her children were automatically entitled to benefits, assuming they were under the age limitations. If the mother was fully, but not currently insured, the child could receive benefits only if the mother provided at least one-half of the child's support, or the child was neither living with nor receiving any support from the father. Social Security Amendments of August 28, 1950, ch. 809, § 101(a), 64 Stat. 484. These limitations on the benefits available to the children of working women were eliminated in 1967. Social Security Amendments of 1967, Pub. L. No. 90-248, § 151, 81 Stat. 860 (1968), *amending* 42 U.S.C. § 402(d) (1964) (codified at 42 U.S.C. § 402(d) (1970)).

38. REPORT OF THE ADVISORY COUNCIL ON SOCIAL SECURITY, S. MISC. DOC. NO. 4, 76th Cong., 1st Sess. 18 (1939).

39. Because the 1971 Advisory Council conceived of the mother's benefit as giving a choice to women not to work but to stay home, they saw no reason to extend the benefit to fathers:

A man generally continues to work to support himself and his children after the death or disability of his wife. . . . Even though many more married women work today than in the past, so that they are both workers and homemakers, very few men adopt such a dual role; the customary and predominant role of the father is not that of a homemaker but rather that of the family breadwinner. . . . The Council therefore does not recommend that benefits be provided for a young father who has children in his care.

1971 ADVISORY REPORT, *supra* note 25, at 35.

A housewife is completely left out of OASDI's primary coverage, and no provision

of the assumption that women only work for "pin money,"⁴⁰ the lack of a father's benefit perpetuates the secondary importance of the wife's contribution to the family income.

THE QUESTIONABLE CONSTITUTIONALITY OF SOCIAL SECURITY'S SEX CLASSIFICATIONS

The sex classifications which remain in the OASDI benefit structure are vulnerable to constitutional attack. With recent United States Supreme Court extensions of equal protection and due process doctrines in the area of sex discrimination, it is possible that the sex-based statutory scheme of OASDI will be declared void. Private employment benefit plans similar to OASDI have been found to violate title VII of the Civil Rights Act of 1964.⁴¹ In addition, the Equal Rights Amendment to the United States Constitution,⁴² if ratified, will necessitate abandonment of the sex-stereotyped benefit structure.

The Effect of Reed and Frontiero on OASDI

Traditionally, in cases challenging legislative classifications based on sex under the equal protection and due process doctrines,⁴³ the Supreme Court used the more lenient "rational relationship" test,⁴⁴ rather than requiring a showing of "compelling state interest."⁴⁵ The Court allowed legislatures to draw sharp lines between the sexes,⁴⁶ and found a rational basis for sex classification in its belief that "[women are] still regarded as the center of home and family life."⁴⁷

exists to help replace her services if she dies or becomes disabled. However, because women who work outside the home are otherwise covered by the Act, the lack of a benefit for fathers to replace a working wife's contribution to the family income seems indefensible.

40. Riches, *supra* note 27, at 11.

41. See note 79 *infra* & text accompanying. Title VII is codified at 42 U.S.C. § 2000e (1970), as amended (Supp. II, 1972).

42. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

43. The equal protection clause of the fourteenth amendment is not directly applicable to federal legislation such as OASDI, but the concepts surrounding it have been incorporated by the Supreme Court into the due process clause of the fifth amendment when reviewing federal action. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

44. *E.g.*, *Richardson v. Belcher*, 404 U.S. 78, 84 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485, 487 (1970); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

45. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (race); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (affects fundamental interest in interstate movement).

46. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

47. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). In the only reported case to date attacking a sex classification in OASDI as a violation of equal protection and due process, the Second Circuit Court of Appeals followed the traditional rational relationship approach and declared that "special recognition and favored treatment can constitutionally be afforded women." *Gruenwald v. Gardner*, 390 F.2d 591, 592, *cert. denied*, 393

The first break in this traditional approach to sex classification came in *Reed v. Reed*.⁴⁸ In a unanimous decision, the Court struck down an Idaho statute giving preference to males over females in selecting administrators of decedents' estates. The Court held that the sex classification was arbitrary and based on criteria wholly unrelated to the objective of the statute.⁴⁹ The state's rationale that men as a rule are more conversant with business affairs than women⁵⁰ was implicitly rejected by the Court. It went on to say that even though the state's interests in achieving administrative efficiency and avoiding intrafamily controversy are not without some legitimacy, "the choice in this context may not lawfully be mandated solely on the basis of sex."⁵¹ Although *Reed* did not declare sex a "suspect classification," it was viewed by many as the beginning of a more careful evaluation of sex classifications by the Court.⁵²

A second shift in the Court's treatment of sex classification came

U.S. 982 (1968). In *Gruenwald*, the male plaintiff contended that the age differentials based on sex, in 42 U.S.C. § 415(b)(3) (1970), used in computing average monthly wages were unconstitutional. For the details of these provisions, see notes 12-15 *supra*. The provisions were upheld as constitutional because the court felt the sex classification was not patently arbitrary or utterly lacking in rational justification, and did not involve invidious discrimination. Because women as a class earn less than men, and their economic opportunities in higher age groups are less, the court found a reasonable relationship between the classification and the objective of the provision. This objective, according to the court, was to reduce the disparity between the economic and physical capabilities of men and women. 390 F.2d at 592.

48. 404 U.S. 71 (1971).

49. *Id.* at 74, 76.

50. Brief for Respondent at 12, *Reed v. Reed*, 404 U.S. 71 (1971).

51. 404 U.S. at 77.

52. Justice Douglas in his concurring opinion in *Alexander v. Louisiana*, 405 U.S. 625 (1971), challenging the exemption of women from state juries, declared:

The absolute exemption provided by Louisiana . . . betrays a view of a woman's role which cannot withstand scrutiny under modern standards. . . . Classifications based on sex are no longer insulated from judicial scrutiny by a legislative judgment that "woman's place is in the home," or that woman is by her "nature" ill-suited for a particular task.

Id. at 639-41. He then cites *Reed*. Similarly, Judge Duniway, dissenting in *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), challenging the Army's regulation discharging officers who become pregnant, argued that *Struck* should have been given a rehearing in light of *Reed*, and stated: "It is not yet clear whether classification based upon sex is 'suspect,' . . . I think, however, that eventually the Supreme Court will so hold." *Id.* at 1378. In *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), the Court of Appeals concluded that § 214 of the Internal Revenue Code, 26 U.S.C. § 214 (1970), allowing only women and married men to deduct expenses for the care of dependents, was unconstitutional. Under the scrutiny required by *Reed*, the classification, based solely on sex, was held to constitute an invidious discrimination against never-married men. 469 F.2d at 470. Compare Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV., 157 (1973) [hereinafter cited as Getman] and Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419 (1972) [hereinafter cited as Sedler] with Ginsberg, *Comment on Reed v. Reed*, 1 WOMEN'S RIGHTS L. REP., Spring, 1972, at 7 (calling the *Reed* opinion a "small, guarded step" forward).

with *Frontiero v. Richardson*,⁵³ challenging the sex classifications in the federal statutes defining dependents and dependents' benefits for uniformed service personnel.⁵⁴ Under these laws, in order for a woman in the military to claim her husband as a dependent for purposes of obtaining an increased housing allowance and medical and dental benefits, he must receive over one-half of his support from his wife.⁵⁵ On the other hand, a wife of a serviceman is presumed dependent, as in OASDI, and is automatically eligible for benefits.⁵⁶ The plaintiff in *Frontiero* requested dependents' benefits for her husband, a full-time student. His share of their total expenses was \$354 per month, but because he received \$205 per month in veterans' benefits, he did not meet the one-half support requirement.

A three-judge panel sustained the statutory scheme, finding that the distinction was not based *solely* on sex, as in *Reed*, but was based on sex *plus* the specific relationship of the dependent individual to the servicemember.⁵⁷ Looking for a "reasonable basis" upon which to uphold the statute, the court pointed to the administrative burden which Congress allegedly sought to avoid by establishing wives' presumptive dependency.⁵⁸ The court reasoned that a presumption to facilitate administration does not violate equal protection if it does not unduly burden or oppress the class upon which it operates.⁵⁹ The court found that the only burden on women in this case was that married women were not allowed to receive "windfall" payments which married men received by claiming wives not in fact dependent.⁶⁰ This burden was not considered sufficiently oppressive to void the statute.⁶¹

The Supreme Court reversed the district panel and held that the challenged statutes violated the due process clause insofar as they require a servicewoman to prove the dependency of her husband.⁶² Justice Brennan joined by Justices Douglas, White and Marshall, found that

53. 411 U.S. 677 (1973).

54. 37 U.S.C. § 401 (1970); 10 *id.* § 1072.

55. 37 *id.* § 401; 10 *id.* § 1072(2) (C).

56. 37 *id.* § 401; 10 *id.* § 1072(2) (A).

57. *Frontiero v. Laird*, 341 F. Supp. 201, 206, 209 (M.D. Ala. 1972). The court noted that women in the armed services can claim unmarried, legitimate, minor children for purposes of medical and dental benefits without a showing of dependency in fact. *Id.* at 205-06. Judge Johnson dissented, finding the statutory classification based solely on sex. He would declare the statutes unconstitutional on the basis of *Reed*, regarding the rationale of administrative convenience as an insufficient rational basis to support the classification. *Id.* at 209, 210.

58. *Id.* at 207.

59. *Id.*

60. *Id.* at 207-08.

61. *Id.* at 208.

62. *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973).

classifications based on sex, like those based on race, alienage and national origin, are inherently suspect and must be subjected to close judicial scrutiny.⁶³ In abandoning the rational relationship test, previously applied to sex classifications, Justice Brennan cited *Reed*, characterizing it as a "departure from 'traditional' rational basis analysis."⁶⁴ He based his conclusion that sex is a suspect classification upon the pervasive, although often subtle, discrimination against women, and upon the fact that sex, like race, is an immutable characteristic determined by birth which frequently bears no relation to one's ability to perform or contribute to society.⁶⁵ He also cited *Reed* as precedent for rejecting the government's rationale of administrative convenience.⁶⁶

Although eight Justices concurred in the *Frontiero* judgment,⁶⁷ only four were willing to declare sex a suspect classification.⁶⁸ Justice Powell, joined by Chief Justice Burger and Justice Blackmun, declined to characterize sex as a suspect classification "with all the far-reaching implications of such a holding."⁶⁹ Justice Powell preferred to decide the case on the authority of *Reed*, reserving for the future any expansion of its rationale.⁷⁰ In addition, because the Equal Rights Amendment had been submitted by Congress to the states for ratification, he thought that the adoption of the strict scrutiny test for sex classification would preempt "by judicial action a major political decision which is currently in process of resolution."⁷¹ Justice Stewart joined neither Justice Brennan's nor Justice Powell's opinion, but simply concurred in the judgment on the basis of *Reed*.⁷²

63. *Id.* at 688.

64. *Id.* at 684.

65. *Id.* at 686.

66. *Id.* at 690.

67. Justice Rehnquist dissented for the reasons given by the district court. *Id.* at 691.

68. Two lower federal courts and two state courts, however, have previously reached the conclusion that sex is a suspect classification. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *State v. Costello*, 59 N.J. 334, 282 A.2d 748 (1971); cf. *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968), which examined a sex distinction in a criminal statute under the "strict scrutiny" standard, and found the sex classification to constitute invidious discrimination. In *Thorn v. Richardson*, 4 BNA FAIR EMPLOYMENT PRACTICES CAS. 299 (W.D. Wash. 1971), women plaintiffs attacked the referral system of the federally administered Work Incentive Program (WIN), which under federal regulations gives preference to unemployed male welfare recipients over unemployed female recipients. The court held that the sex classifications were suspect, encroached upon the plaintiff's fundamental rights, and were without rational basis as is required by the fifth and fourteenth amendments. *Id.* at 302.

69. 411 U.S. 677, 692 (1973).

70. *Id.*

71. *Id.*

72. *Id.* at 691.

The judgment in *Frontiero* eliminated the requirement that service women prove the dependency of their husbands, resulting in the extension of the presumption of dependency to all spouses regardless of sex. The one-half support requirement struck down in *Frontiero* is identical to that found in the husband's and widower's social security benefits.⁷³ Thus, *Frontiero* should lead the Court to hold Social Security's male support requirements unconstitutional, and extend to men the presumption of dependency continued in the wife's and widow's benefits. Extension of the dependency presumption would mean that a husband or widower would automatically receive whichever benefit was greater, his own or a derivative benefit based upon his wife's wage record.⁷⁴

In addition, *Frontiero* can be used as the basis for arguing that the lack of a father's benefit⁷⁵ constitutes discrimination as invidious as the presumptive dependency rules. Because Social Security makes no provision for a father's benefit, a mother's employment results in less financial protection for her family than a father's employment. If a working mother dies or becomes disabled, fathers are penalized by the lack of any benefit to replace either the mother's contribution to the family income or her provision of household or childcare services.⁷⁶

73. Compare 42 U.S.C. §§ 402(c)(1)(C), (f)(1)(D) (1970) with 37 *id.* § 401 and 10 *id.* § 1072(2)(C). The Social Security Act also includes a one-half support requirement in the dependent benefit for a worker's parents, but the parents' provision makes no distinction on the basis of sex; it applies equally to male and female workers, and to male and female parents. 42 U.S.C. § 402(h)(1)(B) (1970).

74. Even the 1971 Advisory Council on Social Security recognized that the value of social insurance protection for dependents was lower for working women than for working men, due to the support requirement that husbands and widowers must meet to receive benefits on a woman's wage record. The Advisory Council pointed out, however, that this lower value of dependents' protection was offset by the greater value of the working woman's retirement benefit resulting from women's greater longevity. 1971 ADVISORY REPORT, *supra* note 25, at 63.

As the Court noted in *Frontiero*, the statutes requiring proof of support by husbands are not in any sense designed to rectify the effects of past discrimination against women. 411 U.S. at 689 n.22. *Frontiero* can be distinguished from *Gruenwald v. Gardner*, 390 F.2d 591, *cert. denied*, 393 U.S. 982 (1968). *Gruenwald* upheld a sex classification in OASDI because the provision in question worked to the advantage of women in reducing the existing monetary disparity between male and female worker's benefits. *Id.* at 592. Although not designed with affirmative action in mind, the age differentials previously found in the computation provisions may have been able to pass a strict judicial scrutiny test as a means of promoting equality for women. See Getman, *supra* note 52, at 165-66; Sedler, *supra* note 52, at 454.

75. See notes 36-40 *supra* & text accompanying.

76. *Wiesenfeld v. Secretary of Health, Education and Welfare*, Civil No. 268-73 (D.N.J., filed Feb., 1973) is a class action challenging the denial of a "mother's" benefit to a father who has in his care an eligible child. The plaintiff's wife had been a school teacher for seven years. She contributed fully to social security and earned substantially more than her husband until her death in childbirth. The plaintiff husband qualified for benefits under 42 U.S.C. § 402(g) (1970) in all respects except his sex.

OASDI As Measured by the Public Policy of Title VII

Although OASDI, as a federal retirement plan, is not covered by title VII of the Civil Rights Act of 1964, the commitment to sexual equality expressed in title VII⁷⁷ lends support to a court finding Social Security's sex classifications unconstitutional under *Frontiero*. Justice Brennan, in finding sex a suspect classification in *Frontiero*, referred to title VII and noted that

Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance.⁷⁸

Title VII bans discrimination in "conditions of employment" which has been construed to include retirement and death benefit plans.⁷⁹ Although title VII is not applicable to OASDI, its sex-based benefit structure would be illegal if OASDI were an arrangement between private employers and employees.

The Equal Employment Opportunity Commission (EEOC) which enforces title VII, in its guidelines on sex discrimination, has declared that benefits conditioned on "head of household" or "principle wage earner" status will be found *prima facie* violations.⁸⁰ The Guidelines also prohibit employers from establishing benefits for wives and families of male employees where the same benefits are not available for the husbands and families of female employees.⁸¹ In litigation involving a private retirement plan, the EEOC held that an employer's death benefit plan similar to OASDI violated title VII by providing for mandatory payments to the surviving wife of a deceased worker, while paying benefits to a deceased worker's husband only if he was physically or mentally incapable of self-support.⁸² The employer argued that the death benefits did not discriminate on the basis of sex, but were based upon the fact that married women were generally supported by their husbands and had

77. Title VII of the Civil Rights Act of 1964 states in pertinent part:

It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

42 U.S.C. § 2000e-2(a) (1) (1970).

78. 411 U.S. 677, 687-88 (1973).

79. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); *Rosen v. Pub. Serv. Elec. & Gas Co.*, 328 F. Supp. 454 (N.J. 1970), *aff'd*, 477 F.2d 90 (3d Cir. 1973).

80. 29 C.F.R. § 1604.9(c) (1973).

81. *Id.* § 1604.9(d).

82. CCH 1973 EEOC DEC. ¶ 6050, at 4083 (1969).

fewer obligations to support others.⁸³ In rejecting this defense, the EEOC held such presumptions based on the collective characteristics of a sexual group were without merit because title VII was intended to protect individuals from the penalizing effects of stereotypes based on sex.⁸⁴

Title VII lends support to the argument that Social Security's sex classification may no longer be viewed as a permissible method of meeting the welfare and income security goals of OASDI. What is important to these goals is the economic role assumed by each spouse, not the spouse's sex. It would be highly anomalous for a court to decide that the sex classifications of OASDI meet either the rational relationship or the compelling state interest tests, when such classifications are not allowed in employment plans within the private sector.

Impact of the Equal Rights Amendment on OASDI

Finally, another legal tool that could be used to eliminate OASDI's sex classification would be the proposed Equal Rights Amendment (ERA) to the Constitution.⁸⁵ The simple theory of the ERA is that sex would no longer be a permissible basis for statutory classification.⁸⁶ The fact that members of one sex are more likely than members of the other sex to perform particular functions would not "authorize the Government

83. *Id.* at 4084.

84. *Id.* Another plan which paid death benefits only to surviving spouses of male employees, excluding female employees, was also found to violate title VII. CCH 1973 EEOC DEC. ¶ 6114, at 4206 (1970). A group health insurance plan, which required that an employee be a "head of household" to be eligible for benefits, was also rejected by the EEOC. CCH 1973 EEOC DEC. ¶ 6009, at 4026 (1969). In that case married males were assumed to be "heads," while married women as a group were assigned to an ineligible status. Again, the EEOC stated that such benefits could not be based on general assumptions regarding females as a group, including the employer's assumption that any working female was dependent upon her husband for support, regardless of the extent to which she contributes to the actual support and maintenance of her family. *Id.*

85. The Equal Rights Amendment reads as follows:

Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 2d Sess. (1972); S.J. Res. 8, 92d Cong., 1st Sess. (1971). As of April, 1973, 30 states had ratified the amendment; 38 states are required for adoption. The states have until March, 1979 to ratify the proposed twenty-seventh amendment. 1 WOMEN'S RIGHTS L. REP., Spring, 1973, at 104.

86. SENATE COMM. ON THE JUDICIARY, EQUAL RIGHTS FOR MEN AND WOMEN, S. REP. NO. 92-689, 92d Cong., 2d Sess. 11 (1972) [hereinafter cited as SENATE REPORT]; Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889 (1971) [hereinafter cited as *Equal Rights*].

to fix legal rights or obligations on the basis of membership in one sex."⁸⁷ Under this rationale, legislative classification is permissible in "situation[s] where a physical characteristic unique to one sex is involved"⁸⁸ or where personal privacy is essential.⁸⁹ Otherwise, the proposed amendment would require that legal distinctions be made on the basis of characteristics or functions common to both sexes.

Consequently, under the ERA, all spouses would be eligible for social security benefits on equal terms.⁹⁰ The male and female dependent spouse benefits could be reconciled in two ways: either by eliminating the presumption or by extending the presumption of dependency to husbands and widowers, as in *Frontiero*.⁹¹ The dependency presumption could be eliminated by requiring women to prove that they receive one-half of their support from their husbands. This would be the least desirable alternative since forcing wives to prove receipt of support would increase the complexity of an already intricate system and would proliferate litigation.⁹² Thus, the preferable alternative under the ERA would be to extend Social Security's presumptive dependency to men so that husbands and widowers would be eligible on the same basis as wives and widows. Extension would result in the least change in the present system.⁹³

87. SENATE REPORT, *supra* note 86, at 11-12.

88. *Equal Rights*, *supra* note 86, at 890.

89. SENATE REPORT, *supra* note 86, at 12.

90. Congresswoman Martha Griffiths, in her testimony in hearings on the ERA, used the social security provisions based on the sex of the spouse as examples of the impact the ERA would have on federal as well as state laws. *Hearings in Equal Rights for Men and Women Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 38 (1971). In the debate on the floor of the Senate prior to passage of the ERA, Senator Fong introduced a letter from HEW Secretary Richardson listing instances of the Social Security Act's differential treatment based on sex which would be affected by the ERA. 118 CONG. REC. 4404 (daily ed. Mar. 21, 1972).

91. *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973). Under title VII of the Civil Rights Act of 1964, U.S.C. § 2000e (1970), as amended (Supp. II, 1972), employers would also have the alternative of extending a benefit to both sexes on the same terms, or of eliminating it. In addition, the Equal Rights Amendment would require that the present benefit for a mother of an eligible child be extended to fathers, and that divorced men be eligible for benefits on the same basis as divorced wives and widows.

92. Such litigation has continually occurred under the previously existing one-half support requirement for divorced wives. Social Security Amendments of July 30, 1965, Pub. L. No. 89-97, § 308, 79 Stat. 375-77. Including a one-half support requirement for wives might also deny coverage to women who work outside the home, but are not covered by social security or any other federal retirement plan, such as some domestic workers. In 1972, 500,000 domestic workers were not covered by OASDI. 36 Soc. Sec. BULL., Mar., 1973, at 75 (Table Q-2).

93. Currently, many more women than men are drawing benefits as dependents and would be affected by the addition of a support requirement for women. As of June, 1972, 6,990,000 women were drawing benefits as wives and widows. 35 Soc. Sec. BULL., Dec., 1972, at 76-78 (Tables Q-7 to -10). Only 11,695 husbands and widowers were currently drawing benefits as dependents, and although it is difficult to estimate how

If the social security benefit provisions are extended through application of the Equal Rights Amendment or the equal protection and due process clauses, enabling men to receive benefits on the same terms as women, these modifications would probably not create many additional beneficiaries or increase the size of payments. Men's rates of employment, average earnings and average PIA will remain higher than women's until employment discrimination against women ends. However, elimination of the current sex classifications would be significant in altering the present expectations implicit in the Act that all husbands are primary breadwinners and all wives are at best secondary earners. It would provide equal benefits for those couples who voluntarily choose to differ from the accepted norm, or who are forced to adopt nontraditional patterns for financial reasons. After modification, the statutory scheme would be sex-neutral on its face: the primary family earner would receive a workers' benefit, and the spouse, regardless of sex, would receive a derivative benefit if she or he had a PIA less than one-half of the primary earner's.

A STEP BEYOND ELIMINATION OF SEX CLASSIFICATIONS

Abolishing the sex classifications in OASDI will not alter the status of economic dependency which is a reality for many, if not most, women. A larger proportion of women will continue to receive a derivative spouse's benefit, based on their husbands' PIA, rather than their own worker's benefit. The perpetuation of women's dependent status through the social security system is regarded by many as a continued form of second-class treatment, ignoring women's productive contribution to society through their work as housewives and mothers.⁹⁴ Because many women do not work for money, they are unable to earn social security credits. Nevertheless, their work needs to be recognized as indispensable and as worthy of protection against the risks of death and disability. The social security system, by making benefits entirely dependent on substantial prior attachment to the work force, perpetuates society's dis-

many additional men would be able to qualify under the present wife's benefit rules, it is not likely to be a substantial number. If Congress is concerned about dual entitlement to benefits, *see* notes 30-32 *supra* & text accompanying, it could easily add a provision reducing a spouse's benefit by the amount received under another federal retirement system, or by giving a spouse the option of electing one of the two available benefits.

94. *See* HEW REPORT, *supra* note 3, at 91-92; Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277 (1971) [hereinafter cited as Walker]. Walker refers to the homemaker "Black-out Period," pointing out that a housewife is not eligible for any kind of federal cash assistance between the time her last child leaves home and the time she reaches age 62. Walker, *supra*, at 278. Social Security offers no protection to a housewife against her own death or disability, and provides no replacement benefit to meet her family's increased costs of house and child care.

regard for those who do not work for pay. To encourage the treatment of women as equals and to provide minimum protection for homemakers against disability and death, the social security system should be revised to protect homemakers as primary workers.

Women's work patterns often vary from the patterns considered normal for most men. Although a majority of women work for wages at some point during their lives, many withdraw from the work force for varying lengths of time in order to bear and raise children.⁹⁵ Because computation of a person's PIA is based on a certain length of *continuous* work, interrupted work patterns and periods of part-time employment are major reasons many women do not receive their own social security benefits, even though they have accumulated social security credits.⁹⁶ Coverage of homemakers as workers would allow women to maintain a continuous work record throughout their productive years, and the multiple roles women play as workers and child rearers would no longer penalize them in terms of accumulated benefits.⁹⁷

One concrete legislative proposal has been developed to provide primary coverage of homemakers. House Bill 252, introduced on January 3, 1973,⁹⁸ would extend social security coverage to an individual who resides with, and maintains a household for, another employed or self-employed person. Monthly wages equal to the national average monthly wage for employment in service occupations would be deemed to have been paid to the individual for such "householder service."⁹⁹ If the householder was also employed part-time, she or he would be covered as a householder as long as the earned wages were insufficient to meet the minimum requirements for regular coverage.¹⁰⁰ General revenue funds would be used to finance this additional coverage.¹⁰¹ The provisions make no distinctions on the basis of sex, so that men as well as women would be free to adopt dual roles if they chose to do so.

In the past, the major objections leveled against the coverage of

95. HANDBOOK, *supra* note 18, at 7-8.

96. Bixby, *supra* note 11, at 9.

97. An individual work record would also reduce the risk attendant upon divorce, as benefits would not be based on marital status; a wife would no longer lose all accumulated social security protection if her marriage had not lasted twenty years. See 42 U.S.C. §§ 402(b)(1)(H), 416(d)(1)-(2) (1970).

98. 93d Cong., 1st Sess. (1973). The bill was introduced by Representatives Abzug, Badillo, Conyers, Harrington, Podell, and Tiernan, and was referred to the Committee on Ways and Means. As of September, 1973, it was still languishing in the committee. WOMEN'S EQUITY ACTION LEAGUE, WASHINGTON REPORT No. 14 (1973).

99. H.R. 252, 93d Cong., 1st Sess. § 232(c) (1973).

100. *Id.* § 232(b)(4). For minimum requirements of coverage as a worker see note 8 *supra*.

101. H.R. 252, 93d Cong., 1st Sess. § 3 (1973).

homemaking services have been the practical difficulties of imputing a monetary value to unpaid work, and the related question of who should pay the payroll tax "contribution" to finance the additional benefits.¹⁰² House Bill 252 avoids these two problems by using the national average wage for service workers to impute value and general revenue funds to finance benefits. Similar questions were answered in 1939 when the original provisions for dependent's benefits were passed, enlarging the welfare aspects of Social Security and departing from a strict insurance model.¹⁰³ Neither married men nor their wives were at that time asked to meet the additional costs of the wife's and widow's benefits; they were financed by all who paid the payroll tax.¹⁰⁴ The problem of imputed value was avoided by making the benefits dependent on the husband's earnings.¹⁰⁵ Today, however, recognizing the regressive nature of the payroll tax,¹⁰⁶ general revenue financing is preferable to higher payroll tax rates.

House Bill 252 does not provide for elimination of any of the present dependent's benefits, but would merely add an alternative benefit. If a wife is eligible to receive a derivative dependent's benefit higher than the household worker's benefit, she would be allowed to do so.¹⁰⁷ Thus, with House Bill 252, the Social Security Act would incorporate two views of homemakers by according them status as workers, in addition to recognizing their economic dependency.

CONCLUSION

Social security coverage of homemakers as workers would constitute a major expansion of the system, approaching universal protection for

102. See PRESIDENT'S COMMISSION, *supra* note 3, at 37; Bixby, *supra* note 11, at 10.

103. REPORT OF THE SOCIAL SECURITY Bd., H.R. Misc. Doc. No. 110, 76th Cong., 1st Sess. 5 (1939).

104. *Id.* at 5-7, 11-12.

105. Social Security Amendments of August 10, 1939, ch. 666, § 202(b), 53 Stat. 1364 (codified at 42 U.S.C. § 402(b)(2) (1970)).

106. See generally BRITAIN, *supra* note 2.

107. Although not provided for in H.R. 252, 93d Cong., 1st Sess. (1973), the householder service benefit should also set the minimum benefit level, so as not to penalize those who are forced to work for wages below the average service worker's wage. The householder service benefit would form a floor below which benefits would not be allowed to fall. The national average monthly wage in service occupations was approximately \$447 as of March 1973. 19 EMPLOYMENT & EARNINGS, June, 1973, at 86 (Table C-2). The average hourly pay for service occupations was listed at \$3.30 and average weekly pay was \$111.87.

H.R. 252 would not be the only possible way to extend primary coverage to homemakers. An alternative method of coverage could be worked out by splitting combined family earnings, attributing a portion to each spouse as her or his own earnings, and in that way establishing individual wage records that would survive the marriage. If "payroll" contributions from homemakers were regarded as necessary, they could be made through the federal income tax reporting system. See J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY—PERSPECTIVES FOR REFORM 188-91 (1968).

all persons over age 62 against the risks of retirement, death and disability. With the elimination of sex classifications as a relevant basis upon which to condition benefits, the system would remain tied to the economic or productive functions of individuals. Because social security benefits are derived from an average monthly wage, however, women will continue to receive lower benefits than men, whether as workers or householders, as long as women are generally discriminated against in hiring, promotion and pay.

There is no way of eliminating this more subtle and indirect differential impact on women unless social security benefits are divorced from previous work experience. However, such a major revision in the concept of Social Security is highly unlikely. Short of such sweeping legislative reform of Social Security, the conversion of the present benefit structure into a sex-neutral statutory framework is necessary in order for Social Security to accomodate present changes in family roles and the increasing economic participation of women.

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